STATE OF MICHIGAN

COURT OF APPEALS

LISA R. BOEHNLEIN,

Plaintiff-Appellee,

v

ALBERT J. BOEHNLEIN,

Defendant-Appellant.

UNPUBLISHED
July 6, 2001

No. 231000
Washtenaw Circuit Court
LC No. 94-001984-DM

Before: Hood, P.J., and Whitbeck and Meter, JJ.

PER CURIAM

Defendant Albert Boehnlein appeals as of right the trial court's order denying his March 9, 2000, motion for a change in custody. He asserts that the trial court erred in denying his motion without first holding an evidentiary hearing. We affirm.

I. Basic Facts And Procedural History

Plaintiff and defendant were married in June 1993. They have one child, a son, Christopher. They separated on May 3, 1994, and plaintiff filed a complaint for divorce immediately thereafter. Christopher has had special needs since birth, was diagnosed early as "significantly delayed", and was formally diagnosed with autism in 1998. On July 21, 1994, a stipulated interim order regarding the custody of the minor child was entered, giving the parties joint legal custody, but giving temporary physical custody to plaintiff. On February 24, 1995, the trial court entered a judgment of divorce, but reserved the matters of child custody and support, pending a further evidentiary hearing. The parties were ordered to undergo psychological evaluations. The psychological report that resulted from those evaluations recommended that the parties not be awarded joint legal custody because of the hostility and animosity between the parties. On November 20, 1995, the trial court entered an amended judgment of divorce, giving sole legal custody to Lisa Boehnlein. The trial court also ordered Lisa Boehnlein to place her son "in a daycare setting which specializes or has substantial expertise in infants or toddlers. [The child's] special needs should take precedence over the parent's transportation needs. Plaintiff shall be responsible for selecting a new daycare provider."

The parties' acrimonious relationship did not improve over the next several years. During that time, Albert Boehnlein filed numerous motions in the trial court to change the

custody and visitation order. The friend of the court consistently recommended maintaining the existing custody arrangement. In a December 1996 report and recommendation responding to Albert Boehnlein's motion requesting a change in custody because, he alleged, his son was not receiving appropriate speech therapy, the friend of the court commented that Lisa Boehnlein's therapy and child care choices for her son were "thoughtful and reasonable." The friend of the court report also indicated:

> The continuing motioning up of the same issue by the defendant/father could be viewed as frivolous and fatuous, and potentially subject to sanctions of the court. The continuous and redundant motioning of the issue of custody can also be viewed as further proof of the validity of the past recommendation for sole legal custody of the minor child to the plaintiff/mother.

On May 5, 1998, Albert Boehnlein asked the trial court to permit him to enroll his son in a speech therapy program at Eastern Michigan University, but the trial court denied the motion.

On March 9, 2000, Albert Boehnlein once again filed a motion for change of custody. In his motion, he asserted that the trial court should order a change of custody because his lack of communication with his former wife was "stressing" his relationship with his son. Though Lisa Boehnlein had enrolled the child in a special program for autistic children, the Treatment and Education of Autistic and Related Communication Handicapped Children (TEEACH) program, Albert Boehnlein wanted to decrease the amount of time his son spent in daycare and to enroll the child in a therapy program known as Applied Behavioral Analysis (ABA).[1]

The trial court's March 13, 2000, order stated that "[i]t is not necessary at this time to argue the motion before the court. The court has reviewed the file and pleadings with some care." The trial court, however, asked that the parties brief whether Albert Boehnlein was nevertheless entitled to an evidentiary hearing to determine if he should be given the relief requested. The trial court, in an order issued the next day, appointed a guardian ad litem to consider the same issue. In a written report submitted to the trial court in June 2000, the guardian ad litem recommended that the trial court either hold an evidentiary hearing or ground its decision on the materials and affidavits the parties had submitted. Subsequently, at a hearing the trial court convened on June 29, 2000, the trial court stated:

> And you've requested a change of custody based upon your thoughts about the program that you have in mind. I may have each of the parties submit arguments in writing to try to demonstrate to me there's been a sufficient change in circumstances for me to even consider the petition.
>
> I'm not willing, just on the bare allegation of a material change in circumstances, to grant you an evidentiary hearing on a change of custody. I'm going to have you demonstrate by affidavit what your evidence is going to be; and if I think that your affidavits rise to the level of showing a material change in circumstances, I'll grant you an evidentiary hearing.

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[1] Apparently, Albert Boehnlein objected to the TEEACH program because he believed it views autism as incurable and uses dated therapeutic methods.

> Otherwise, we're not going to waste anyone's time preparing and going through everything we have to do for one of those hearings.

After Albert Boehnlein's attorney indicated to the trial court that he was not present at the June 29, 2000, hearing and was unaware of the trial court's request, the trial court reiterated its request of the parties at a hearing on July 27, 2000:

> What I'd like to do, just so we can be real clear about where we stand on this: What I'd like for each counsel to do in this matter is to submit to me affidavits of any witnesses that you would propose to present at an evidentiary hearing so I can review the testimony. I will look at it in the light most favorable to the party who is submitting it. And based on your affidavits, I will determine, whether, if we had a hearing, it would be possible for the Court to conclude that there had been a substantial change of circumstances.

On September 11, 2000, the guardian ad litem submitted an additional report concluding that defendant had not established a proper cause or change of circumstances to justify an evidentiary hearing on a change of custody. Further, the guardian ad litem stated, the child's school had selected the TEEACH program for him and the trial court should defer to that decision. In response, Albert Boehnlein submitted voluminous materials, affidavits, reports, and medical journal articles supporting his assertion that the ABA program provided better treatment for autism. Lisa Boehnlein submitted her son's school records indicating the progress he had made in the TEEACH program, as well as affidavits of two physicians who concluded that the ABA method was controversial and that her son should remain in the TEEACH program.

On September 20, 2000, the trial court issued a written opinion denying Albert Boehnlein's motion for an evidentiary hearing on a change of custody, stating that he had failed to satisfy his burden even though he "knew of the treatment regimen employed by plaintiff at the time of the initial hearing. The studies and experts he now cites were available to him at that time." The trial court also stated that "[t]he fact defendant has decided he disagrees with plaintiff's professional treatment decisions does not, as a matter of law, constitute a substantial change of circumstances to warrant the implementation of another evidentiary hearing." The trial court also denied Albert Boehnlein's motion for reconsideration.

The primary legal question in this appeal is whether a parent is always entitled to an evidentiary hearing on a motion for change of custody, or whether the parent moving for the change of custody must make a preliminary showing that circumstances have changed or proper cause for the change of custody exists before receiving a hearing. We note that defendant alleged throughout that he wished to show a change in circumstances, and never asserted that there was a proper cause for a change in custody.

II. Evidentiary Hearing

A. Standard Of Review

MCL 722.28 specifically provides that "To expedite the resolution of a child custody dispute by prompt and final adjudication, all orders and judgments of the circuit court shall be

affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue."

B. Necessity

We conclude that the trial court did not err when it failed to hold an evidentiary hearing on defendant's motion for a change in custody.

The child custody act[2] authorizes a trial court to modify child custody "orders for proper cause shown or because of change of circumstances," and if in the child's best interests. There is ample case law holding that a trial court cannot order a *change* of custody without first holding a hearing.[3] However, we have found no authority directly addressing a requirement that a trial court hold an evidentiary hearing before *denying* a request for change in custody.

As indicated earlier, the applicable statutory provision, MCL 722.27(1)(c)provides that a trial court cannot modify a custody award unless there is a showing of proper cause or a change in circumstances. The party seeking the custody change has the burden of establishing a proper cause or a change in circumstances *before* the trial court will examine the best interest factors, MCL 722.23, or determine the existence of the best interest factors. *Rossow v Aranda*, 206 Mich App 230, 233; 596 NW2d 643 (1999).

Here, defendant claims that the trial court erred because the trial court failed to hold an evidentiary hearing on defendant's motion for a change in custody. Defendant primarily relies on *Schlender v Schlender*, 235 Mich App 230, 233; 596 NW2d 643 (1999). The *Schlender* decision, however, is totally inapposite. There, this Court held that a blanket administrative policy instituted by the trial court was invalid because it allowed the trial court to deny a motion for a change in custody after only examining the proofs accompanying the motion. This Court held that such an administrative policy was invalid because it conflicted with MCR 3.213, the court rule dealing with postjudgment motions in domestic relations cases, and because it had not been approved by the Supreme Court, as required by MCR 8.112(A)(2).

Schlender simply stands for the proposition that the elimination of an evidentiary hearing by a blanket administrative policy was impermissible. The *Schlender* opinion did not hold that a trial court's refusal to hold an evidentiary hearing, after examining the moving party's documentary evidence and concluding that the moving party had not established a proper cause or a change of circumstances, was improper. We find *Rossow*, *supra*, instructive, where this Court stated:

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[2] MCL 722.27(1)(c).

[3] See, generally, *Dick v Dick*, 210 Mich App 576, 587; 534 NW2d 185 (1995) (MCR 3.210[C] "requires a hearing in a contested case."); *Mann v Mann*, 190 Mich App 526, 532-533; 476 NW2d 439 (1991) (trial court erred in entering interim order changing custody without holding hearing); *Pluta v Pluta*, 165 Mich App 55, 61; 418 NW2d 400 (1987) (trial court erred in failing to hold evidentiary hearing to address best interests factors before entering order changing custody); *Stringer v Vincent*, 161 Mich App 429, 432-433; 411 NW2d 474 (1987) (trial court erred in relying on referee's report and recommendation, which the parties had not stipulated was accurate, and not holding hearing before ordering change in custody).

> The plain and ordinary language used in MCL 722.27(1)(c); MSA 25.312(7)(1)(c) evinces the Legislature's intent to condition a trial court's reconsideration of the statutory best interest factors on a determination by the court that the party seeking the change has demonstrated either a proper cause shown or a change of circumstances. It therefore follows as a corollary that where the party seeking to change custody has not carried the initial burden of establishing either proper cause or a change of circumstances, the trial court is not authorized by statute to revisit an otherwise valid prior custody decision and engage in a reconsideration of the statutory best interest factors.

In short, *Schlender* does not mandate that an evidentiary hearing be held in every instance in which a motion to change custody has been filed. The party seeking the change, as *Rossow* mandates, must carry the initial burden of establishing proper cause or change in circumstances. Our review of the record convinces us that defendant did not meet this burden.[4]

Defendant argues that he established a change in circumstances for two reasons. First, he states that there has been a significant breakdown in the communications with plaintiff which has affected his relationship with the minor child. Second, defendant disagrees with plaintiff's current treatment regimen for the minor child and wishes to change the minor child's therapy to the ABA program.

We are hard pressed to find that defendant's allegations of a breakdown in communications with plaintiff constitute a change in circumstances. On the contrary, the record is replete with evidence that plaintiff and defendant have not had any meaningful communication since shortly after the divorce proceedings began, and cannot even meet without the presence of third parties. We also disagree with defendant's argument that his disagreement with plaintiff's current treatment for the minor child's autism constitutes a change in circumstances or proper cause. The child had a complicated delivery, which caused continual problems for him. Before the initial award of custody, both parties were aware that the minor child was "consistently slow in reaching developmental milestones", and upon his pediatrician's referral to an infant toddler assessment program, he was diagnosed as "significantly delayed." The psychologist's report at that time indicated that both parties planned to continue the child's involvement with this program. The child's needs were also noted in the amended judgment of divorce, which granted plaintiff sole legal custody. The trial court recognized that plaintiff should find day care for the child which specialized in infants and toddlers, and that the child's "special needs should take precedence."

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[4] We note that our Supreme Court recently amended MCR 3.210 to include a new subsection, MCR 3.210(C)(7), effective July 1, 2001, which provides: "In deciding whether an evidentiary hearing is necessary with regard to a postjudgment motion to change custody, the court must determine, by requiring an offer of proof or otherwise, whether there are contested factual issues that must be resolved in order for the court to make an informed decision on the motion." The trial court noted the pendency of this rule change, and anticipatorily followed it.

Defendant's assertion that the current treatment for the child's autism constitutes a change in circumstances is therefore facially incorrect. Plaintiff, defendant and the trial court were all aware of the child's special needs when the award of custody was made. Plaintiff's legal custody of the child carries with it the right to make initial decisions as to such matters as schooling. Defendant cannot sustain his burden of demonstrating a change in circumstances simply by disagreeing with plaintiff's current treatment of the minor child's autism.

Although defendant produced voluminous documentation in support of the ABA program, plaintiff presented her own evidence rebutting defendant's assertions. All that this "dispute of facts" demonstrates is that defendant merely disagrees with the custodial parent's treatment choices. The purpose behind the statutory provision in question is 'to erect a barrier against removal of a child from an established custodial environment and to minimize unwarranted and disruptive changes of custody orders." *Heid v AAASulewski (After Remand),* 209 Mich App 587, 593-594; 532 NW2d 205 (1995). Defendant's approach would lead to the exact opposite result.

Defendant also argues that MCR 3.210(C) requires that a hearing be held within fifty-six days. That court rule, however, applies to motions before the entry of judgment. MCR 3.213 deals with post judgment motions in domestic relations cases, and does not contain a similar time requirement.

Defendant also asserts that the trial court erred when it reviewed and relied on a report by the guardian ad litem. Defendant has not raised this issue in the question presented for review, and thus has failed to preserve the issue. MCR 7.212(C)(5); see also *Phinney v Perlmutter,* 222 Mich App 513, 564; 564 NW2d 532 (1997).

III. Conclusion

The trial court did not err when it denied defendant's request for an evidentiary hearing on his motion for a change in custody. The trial court can properly deny such a request if defendant does not satisfy the initial burden of demonstrating a change in circumstances or proper cause. Defendant did not.

Affirmed.

/s/ Harold Hood
/s/ Patrick M. Meter